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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

—v.—

KING & SPALDING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN SOCIETY OF PROFESSIONAL AND EXECUTIVE WOMEN; CONNECTICUT WOMEN'S EDUCATIONAL AND LEGAL FUND, INC.; EQUAL RIGHTS ADVOCATES, INC.; NATIONAL BAR ASSOCIATION, WOMEN LAWYERS' DIVISION; NATIONAL WOMEN'S LAW CENTER; NORTHWEST WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; WOMEN'S EQUITY ACTION LEAGUE; WOMEN'S LAW PROJECT; AND WOMEN'S LEGAL DEFENSE FUND

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TABLE OF CONTENTS

	Page
Table of Authorities.....	iii
Interest of Amici Curiae.....	1
Statement of the Case.....	2
Summary of Argument.....	3
Argument	
I. THE DECISION BELOW WOULD UNDERMINE THE SUBSTANTIAL PROGRESS WOMEN HAVE MADE TOWARDS ACHIEVING EQUALITY OF EMPLOYMENT OPPORTUNITY IN THE LEGAL PROFESSION.....	6
II. THE LOWER COURT'S VIEW THAT THE PARTNERSHIP FORM MANDATES EXEMPTION OF SOME PARTNERSHIP DECISIONS FROM TITLE VII IS ERRONEOUS.....	19
A. The Eleventh Circuit's Decision is Based on an Idealized and Inaccurate View of "Partnerships"...	20
B. The Eleventh Circuit Erroneously Construed Title VII by Focusing on Formal Differences and Ignoring Functional Similarities Between Corporate and Partnership Forms of Organization in Professional Services Businesses.....	28

Page

III. DECISIONS ON ADMISSION TO PARTNERSHIP ARE EMPLOYMENT DECISIONS SUBJECT TO SCRUTINY UNDER TITLE VII..... 36

A. The Termination of Employment as the Result of an "Up or Out" Policy is an Employment Decision Under Title VII. 36

B. Progression from Associate to Partner is Clearly an Expectation of Employment as an Associate..... 40

C. Partnership Decisions are Not Protected by the Freedom of Association..... 45

IV. TITLE VII'S APPLICATION TO PARTNERSHIPS AFFECTS MANY IMPORTANT SECTORS OF THE ECONOMY, NOT SIMPLY LAW FIRMS..... 54

CONCLUSION..... 64

APPENDIX

TABLE OF AUTHORITIES

Cases	Page
Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975)	5,44
Bellis v. United States, 417 U.S. 85 (1974)	54
Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975)	15
Bradwell v. Illinois, 83 U.S. (16 Wall) 1308 (1873)	6
Buckley v. Valeo, 424 U.S. 1 (1976)	51
Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)	47
CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548 (1973)	5,51
First Bank & Trust Co. v. Zagoria, 51 U.S.L.W. 2529 (Ga. Feb. 23, 1983)	33
Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48 (8th Cir. 1975)	44
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	49,50

Page

Hishon v. King & Spalding, 678 F. 2d 1022 (11th Cir. 1982).....in passim

In re Primus, 436 U.S. 412 (1978). 52

Kohn v. Royall, Koegel & Wells, 59 F.R.I., 515, (S.D.N.Y. 1973) appeal dism., 496 F.2d 1094 (2nd Cir. 1974)..... 14

Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980)..... 38

Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980)..... 38

Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977).....4,37,45,62

NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958)..... 48

NLRB v. Yeshiva University, 444 U.S. 672 (1980)..... 39

Norwood v. Harrison, 413 U.S. 455 (1973).....5,47,48,49

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Page

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Runyon v. McCrary, 427 U.S. 160 (1976).....48,49,50

Sweeney v. Bd. of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978), 604 F.2d 106 (1st Cir. 1979).... 44

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)..... 47

U.S. Postal Service Bd. of Governors v. Aikens, 51 U.S.L.W. 4354 (U.S. Apr. 4, 1983)..... 44

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 46

Widmar v. Vincent, 454 U.S. 263 (1981)..... 47

Books, Newspapers, Periodicals & Studies — Page

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Page

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National Law Journal, Oct. 6, 1980..... 21

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Orren, A Look Inside Those Big Firms, 59 A.B.A.J. 778 (1973).... 27

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Page

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M. Stevens, The Big Eight (1981).....22,26,27,43,59

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Tribe, American Constitutional Law (1978)..... 46

Wayne, The Year of the Accountant, New York Times, Jan. 3, 1982, at D1, Col. 1..... 22

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1982 U.S. Tax Week 1973.....	31,32
S. Rep. No. 494, 97th Cong., 2d Sess. 314 (1982).....	30
26 U.S.C.A. §331(a) (West Supp. 1983).....	34
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118 Cong. Rec. 3802 (1972).....	17,18

INTEREST OF AMICI CURIAE

This brief amicus curiae in support of petitioner is submitted on behalf of the American Association of University Women; American Society of Professional and Executive Women; Connecticut Women's Educational and Legal Fund, Inc.; Equal Rights Advocates, Inc.; National Bar Association, Women's Lawyers Division; National Women's Law Center; Northwest Women's Law Center; NOW Legal Defense and Education Fund; Women's Equity Action League; Women's Law Project; and Women's Legal Defense Fund.*/ These organizations are dedicated to the principle of equal treatment under the law and to the elimination of sex and race discrimination in employment.**/ Amici believe that this case is of great importance for the full effectuation of Title VII's mandate to eliminate employment discrimination.

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*/ Letters from counsel for the parties, consenting to the filing of this brief, are being filed with the Clerk.

**/ Statements describing each organization appear in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, an honors graduate of Columbia University School of Law, was employed in 1972 as an associate by King & Spalding, an Atlanta law firm of more than 50 partners, more than 50 associates and more than 50 non-attorney support staff personnel. She was only the second woman lawyer to be employed by the firm. Among the factors that influenced her decision to accept employment at King & Spalding were representations that she would be considered for partnership after satisfactory completion of five or six years of employment. After she did not receive a promotion to partnership, Ms. Hishon was discharged in 1979 pursuant to the firms's "up or out" policy. She brought suit under Title VII, claiming discrimination on the basis of sex.

The District Court for the Northern

District of Georgia, after refusing to grant discovery on the merits, dismissed Ms. Hishon's complaint under Fed. R. Civ. P. 12(b)(1), holding that, as a matter of law, Title VII did not govern decisions to promote an associate in a law firm to partnership. 24 FEP Cases 1303 (N.D.Ga. 1981). On appeal, the Court of Appeals for the Eleventh Circuit affirmed, over the vigorous dissent of Circuit Judge Tjoflat. 658 F.2d 1022 (11th Cir. 1982).

SUMMARY OF ARGUMENT

The ruling of the courts below, exempting decisions involving promotion to law firm partnerships from scrutiny under Title VII, should be reversed by this Court. In the face of more than a century of overt discrimination against women in law, the decision, if sustained, would reverse the very real and substantial progress women have made towards achieving equality of employment opportunity in the legal profession.

The decision should be reversed because it is based on an inaccurate and idealized view of partnerships as purely voluntary organizations distinct from other corporate forms of business organization. In fact, partnerships in the legal profession, as well as many other professions, are commonly large, complex business organizations, and are functionally very similar to the corporate form of professional business organization.

Contrary to the ruling below, the failure to promote petitioner to partner, resulting in her termination due to King and Spalding's "up-or-out" policy, was an employment decision cognizable under Title VII. Lucido v. Cravath Swaine & Moore, 425 F. Supp. 123, 127 (S.D.N.Y. 1977) and is therefore a "term, condition, or privilege" 42 U.S.C. § 2000e-2(a)(1981) of employment as an associate. Title VII's broad mandate to eliminate employment discrimination clearly

extends to promotional opportunities. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

Moreover, the Eleventh Circuit erred in its analysis of the interests at stake in this case. This Court has expressly held that discriminatory acts are not justifiable in the name of free association, Norwood v. Harrison, 413 U.S. 455, 470 (1973), and that governmental policies intended to further compelling governmental interests, such as those embodied in Title VII, may justify restrictions on associational interests. CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548 (1973).

Finally, the widespread use of the partnership form of business organization by numerous professions and industries throughout our economy would extend the effect of the lower court's ruling far beyond simply law firms.

I. THE DECISION BELOW WOULD UNDERMINE THE SUBSTANTIAL PROGRESS WOMEN HAVE MADE TOWARDS ACHIEVING EQUALITY OF EMPLOYMENT OPPORTUNITY IN THE LEGAL PROFESSION.

It has been over one hundred years since Mr. Justice Bradley upheld the right of Illinois to deny Myra Bradwell admission to the practice of law, characterizing her exclusion as an "adaptation" necessary to preserve and protect women's proper role in society:

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141-42 (1873).

The case of Myra Bradwell is, today, an unfortunate and embarrassing relic of judicial history. No state would presently deny a woman the right to practice law solely because of her sex. But while women have indeed made substantial progress towards achieving equality in the legal profession, the entrenched biases of more than a century of overt discrimination against them continue to impede their full integration and participation at the highest and most prestigious levels of the profession, specifically, elevation to partnership in large law firms.

It is, of course, the legality under Title VII of discriminatory practices engaged in by law firms to limit women's opportunities for promotion to partner which is at issue in this case. As the last major barrier to true equality in their employment, its importance cannot be overstated. The ruling below, which would deny

women, as well as male members of minority groups, the right to invoke the protections of Title VII at this critically important stage of their careers, is a devastating step backwards, and should be overturned by this Court.

The importance of this ruling is underscored by acknowledging that it is only since the passage of Title VII nearly twenty years ago that women have emerged as a significant demographic group both within the law schools and within the profession. Between 1910 and 1970, women represented less than 4% of this nation's lawyers; in 1982, women comprised approximately 15% of all lawyers. Bureau of Labor Statistics, U.S. Dept. of Labor, Employment and Earnings--Household Data Annual Averages, Table 23, p. 158 (January 1983). The statistics on law school enrollments are even more striking: in 1963, women accounted for only 3.8% of all law students; by 1980, the

percentage of women enrolled in this nation's law schools had risen to 33.5%. C. Epstein, Women in Law 53 (1981).

The reason for the dramatic growth in the participation of women in the law during the last twenty years, following so many years of stagnation, is directly traceable to the elimination of a host of discriminatory practices engaged in by law schools and employers throughout much of the previous period. For example, while most of the "elite" law schools had abandoned their exclusionary admission practices by the turn of the century (Michigan, 1870; Yale, 1886; Cornell, 1887; New York University, 1891; Stanford, 1895). Epstein, supra, at 50, exclusionary policies continued in some instances until as recently as 1972.[1] And even when these exclusion-

[1] Washington and Lee finally began admitting women in 1972. Notre Dame opened its doors to women in 1969, Harvard in 1950, and Columbia in 1928. Epstein, supra, at 50.

ary practices were formally eradicated, women encountered in their place informal quotas limiting their enrollment, and more rigorous admission criteria likewise making it more difficult for them to gain acceptance.[2] Epstein, supra p. 9 , at 51.

Of course, eliminating the barriers to their admission to law school did not immediately remove other obstacles to their advancement in the legal profession. For example, many of the initial women graduates found themselves steered towards only par-

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[2] While admissions officers routinely denied that qualified women were barred by any such quota system, alleging instead that it was women's apparent lack of interest in the law which accounted for their small enrollment, many law school faculty members have since acknowledged that quotas on women had in fact existed until the 1960's. Epstein, supra p. 9 , at 52. The likely existence of quotas and stricter admissions criteria is also indicated in a study published by the Harvard Law Record in 1965. The study noted that although the proportion of women students had remained at 3-4% since 1950, the number of applications had "skyrocketed." In 1951, 19 of the 36 women applicants were admitted; in 1965, only 22 of the 139 women applicants were accepted. Id. at 53.

ticular kinds of legal work. A 1958 U.S. government publication advised women lawyers to concentrate on "real estate and domestic relations work, women's and juvenile legal problems, probate work and patent law," undoubtedly a reflection of women's most realistic job opportunities. Epstein, supra p. 9 , at 81. That law firms were expressly not interested in hiring women prior to the passage of Title VII was further evidenced in a survey undertaken by the Harvard Law Record in 1963, for the purpose of ascertaining what law firms looked for in candidates for employment. The Record asked 430 private law firms across the country which traits they valued most highly in evaluating new recruits, as well as those they deemed undesirable. While firms predictably placed a high value on scholarship and initiative, Epstein, supra p. 9 , at 83, the traits deemed undesirable, other than a poor academic record, included sex (women),

race (Blacks), and religion (Jews). Id. Women were apparently considered undesirable by firms of all sizes in all parts of the country and in fact, while Jews, Blacks, and women were all consistently rated negatively, women drew the most negative rating of the three. Id.[3/]

With the emergence of legal services and public interest law firms, jobs with these agencies also proved predictably more available to graduating women lawyers than big corporations or large law firms, primarily because of their lower salaries and

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[3/] In a 1970 survey of women and men graduates from Harvard Law School, it was found that while women were likely to be awarded more employment interviews than their male colleagues, men received more job offers--a finding which the researcher concluded indicated that women's employment choices were more circumscribed than men's. Glancy, Women in Law: The Dependable Ones, 21 Harv. L.S. Bull. No. 5, 22, 24 (June 1970). In fact, the researcher found that a much higher percentage of men (72%) than women (52%) went to work for law firms immediately following graduation, which was again viewed as a reluctance on the part of law firms to hire women attorneys. Id. at 26.

less attractive working conditions. Hochberger, Women in Law--How Far Have They Come?, New York Law Journal, March 21, 1977, p. 1. A survey conducted by the National Association of Law Placement in 1975 found that, whereas only 5.5% of that year's graduating class went to public interest or legal services jobs, 12% of the women graduates took these positions. Id.

Women did not really begin to gain access to the large law firms until the 1970's. At the beginning of the last decade, there were no more than forty women attorneys employed in New York's largest law firms; by 1980, their numbers had swelled to more than six hundred. Epstein, supra p. 9 , at 175. A look at the hiring patterns in large law firms throughout the country during this same period reveals a similar growth in the percentage of women associates, to over 21%

by 1980.[4] Id.

The striking gains of the 1970's were due in large part to the initiation of lawsuits against some of New York's largest and most prestigious law firms for blatantly discriminatory recruitment and hiring practices.[5] Two of these cases advanced to the trial stage, Kohn v. Royall, Koegel & Wells (now Rogers & Wells), 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dism.,496 F.2d 1094

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[4] A survey conducted by the National Law Journal in 1982 of the 151 largest law firms showed that women comprised about 17% of the lawyers in these firms. Flaherty, Women and Minorities: The Gains, Nat'l Law Journal, Dec. 20, 1982, at 1.

[5] The lawsuits were initiated by a group of New York University and Columbia women law students who were outraged by the conduct and statements of many of the large firms' interviewers. Comments ranged from assertions that women were not good litigators, and that their participation in litigation would have to be limited to brief-writing, to admissions of actual bias in the firms which relegated women to "blue sky" work (keeping abreast of changes in state securities laws), involving virtually no client contact and which is today delegated to paralegals in most large law firms. Epstein, supra p. 9 , at 185.

(2nd Cir. 1974) and Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975). In both cases, the defendant law firms eventually agreed to offer a specific percentage of its positions each year to female graduates, Epstein, supra p. 9 , at 185, as did some of the other law firms cited in the initial complaints (and who were guaranteed anonymity). Id.

Unfortunately, the emergence of women in the last ten to twenty years as a significant proportion of law graduates and associates in large law firms has done little to change their continuing scant representation at the partnership level of these firms. In 1956, there existed only one woman partner among the large New York law firms, Epstein, supra p. 9 , at 179. In 1968, there were three. By the summer of 1980, the number of women partners had increased to 41; at the same time, of the 3987 partners in the 50 largest law firms in the country, only 85 were women. Id. In a

survey conducted by the National Law Journal in 1982 of the 151 largest law firms in the country, women, Blacks, and Hispanics comprised only 4.1% of the partners at those firms. Flaherty, supra p.13, at 9. Thirty-two of the firms surveyed had no women partners at all; 106 had no Black partners and 133 had no Hispanic partners. Id. 6/

The almost total exclusion of women from the highest ranks of the legal profession is particularly troubling at a time when women comprise more than one-third of all law graduates. Flaherty, supra p.13, at 11. In the face of so much progress by the legal profession in eradi-

6/ The 1970 Survey of Harvard Law School male and female graduates, correctly forecast this dismal growth in the number of women partners. Noting that men and women seemed to start out on an equal salary level, but that women quickly fell behind, the research concluded that "most of [the women would] never reach the high income, high status positions many of their male counterparts achieve." Glancy, supra p.12, at 27.

cating the effects of more than a century of discrimination, the decision of the Eleventh Circuit can only further inhibit the ability of women to assume their rightful place beside their male colleagues. The availability of Title VII to many of these women in the 1970's was an invaluable tool for establishing their right to participate on a more equal footing with their fellow graduates. As more and more of these women become eligible for promotion to partnership, this Court must not deny them the right to again invoke the protections of Title VII to ensure that such promotional opportunities are not unjustly denied them. 7/

7/ Congress clearly was concerned that Title VII's coverage extend to highly prestigious jobs. Senator Javits, in opposing a 1972 amendment that would have excluded hospital-employed physicians from Title VII coverage said:

> One of the things that those discriminated against have resented the most is that they...cannot ascend the higher rungs in professional and other life. Yet this amendment would...reinstate

[footnote continued]

the possibility of discrimination on grounds of ethnic origin, color, sex, religion--[among] physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain--and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority...that they have to be subject to discrimination...and the Federal law will not protect them. 118 Cong. Rec. 3802 (1972).

II. THE LOWER COURT'S VIEW THAT THE PARTNERSHIP FORM MANDATES EXEMPTION OF SOME PARTNERSHIP DECISIONS FROM TITLE VII IS ERRONEOUS.

The Eleventh Circuit's dismissal of the complaint was based on an idealized and inaccurate view of the nature of "partnership" as both essentially a voluntary association among partners and as clearly distinct from all corporate forms of business organizations. Hishon v. King & Spalding, 678 F.2d 1022, 1026-28 (11th Cir. 1982). Contrary to the lower court's assumptions, partnerships are business organizations that vary dramatically in their internal structures and the relationships among partners; they also are functionally very similar to the corporate form of professional business organization. The inaccuracy of the Eleventh Circuit's assumptions fatally undermines its justification for exempting decisions about promotion to partnership from Title VII.

A. The Eleventh Circuit's Decision is Based on an Idealized and Inaccurate View of "Partnerships"

The court of appeals concluded that the fundamental character of partnerships required that decisions about promotion to partnership be exempted from scrutiny under Title VII,[8] because "the form is the substance" distinguishing such decisions from all other kinds of employment decisions, even employment decisions made by partnerships. 678 F.2d at 1028. In reaching this conclusion, the lower court fail-

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[8] The explicit exemptions from statutory coverage do not include elevation to partnership. See, e.g., 42 U.S.C. §§2000(e)(b)(bona fide private clubs); 2000e-1, 2000-2(e)(certain religiously based employment). To the extent that many partnerships are small, they may fall within the generalized exemption from Title VII of businesses with fewer than 15 employees. 42 U.S.C. §2000e(b). The qualities of intimacy and voluntariness in partnerships that loomed so large for the lower courts, see 678 F.2d at 1026, 24 FEP Cases 1303, 1304-05 (N.D.Ga. 1980), have been recognized by Congress through this size limitation on Title VII coverage.

ed to recognize the substance behind the form.

In fact, partnerships vary substantially in size, details of organization, and relationships among the partners. Far from being oases of intimacy and collegiality, many partnerships are large businesses that exhibit marked differences among partners in power, income, influence, and formal position.

This is hardly surprising, especially in view of the large size of many partnerships. A 1980 survey found more than 100 law firms with 100 or more lawyers, and 45 with more than 150. National Law Journal, Oct. 6, 1980, at 34-39. King & Spalding placed number 106 on this list. Id. Eighty-two of the firms had at least as many partners as King & Spalding's 51, and twenty had at least 75. Id.

The size of the "Big Eight" account-

ing firms[9] is even more striking. In 1981, these eight firms had approximately 7,000 partners in the United States. N.Y. Times, Jan. 3, 1982, at D1, col.1 . Together these firms employ 150,000 people in 2,500 offices in more than 100 nations. Annually, they interview 160,000 students from United States colleges and universities, hire 10,000 new professional employees and make more than 1,000 new partners. Stevens, supra, at 8. Furthermore, large size is not restricted to these eight firms. Seidman & Seidman, the nation's tenth largest CPA firm, has 160 partners and $50 million in annual revenues. Id. at 160.

Within the management structure of

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[9] They are: Arthur Andersen; Arthur Young; Coopers & Lybrand; Deloitte Haskins & Sells; Ernst & Whinney; Peat, Marwick, Mitchell; Price Waterhouse; and Touche Ross. They are "huge multinational business organizations, the largest professional firms in the world, and some of the most influential powers on earth." M. Stevens, The Big Eight 2 (1981).

such large businesses, there is bound to be a significant degree of differentiation among partners. Some law firms have a chairman or presiding partner, in charge of making day-to-day decisions for the firm. P. Hoffman, Lions in the Street 14, 52 (1973); J. Stewart, The Partners 112 (1983). The degree of power exercised by only one partner in a group of 50 or more can be formidable.

> At [one firm], for example, the presiding partner makes the final determination of each partner's share of income, worked out through individual conferences with partners. He determines the agenda of the partnership's Tuesday lunches. He resolves conflicts among the partners, smoothes ruffled feathers and disciplines when necessary.

Stewart, supra, at 242.

More common is the executive committee, usually made up of a small number of the most senior partners. This institution has been described as follows:

> The executive committee acts as overseer for the firm. It is the deciding group; it settles policy matters and disputes. The main, specific task of the committee is to decide on percentages distributed to partners. Members of the group discuss questions about setting up pension plans or moving their offices. Those at the summit make the initial determination about whether new partners are needed. They decide, if the problem becomes overt, about the optimum size of the firm. The executive committee concerns itself with problems of office morale; of client satisfaction. The committee acts as referee and serves to ease conflict within the firm.

E. Smigel, The Wall Street Lawyer 237 (1963) (footnotes omitted). See also Nelson, Practice and Privilege: Social Change and the Structure of Large Law Firms, 1981 Amer. Bar Fdn. Research J. 97, 120.

More rarely, but quite significantly, partnerships have formally stratified systems. One now-dissolved New York law firm, for example, is described as having two classes of partners: "proprietary" and "non-proprietary." Proprietary partners

match the Eleventh Circuit's idea of "partners," who have an interest in the profits of the firm and make crucial decisions, such as who else will become a proprietary partner. Non-proprietary partners, however, strongly resemble what even the Eleventh Circuit would agree are "employees." They are essentially salaried, and able to share in profits only at the discretion of the proprietary partners. National Law Journal, Apr. 25, 1983, at 9, col. 1.[10/]

A very strong centralization of control over business decisions is also evident in large accounting partnerships. They have executive committees, chairmen (or managing partners), and vice-chairmen.

10/ Although rare, such formal stratification is not extinct. For example, a small number of employers recruiting at Harvard Law School in 1982 indicated the existence of a formal "junior partner" status in their firms. Harvard Law School Placement Office, Employer Directory Fall 1982 (available in Harvard Law School Library).

These partners "establish current and long-term policies, set procedures, [and] approve partner earnings..." Stevens, supra p.22, at 32-33. The autonomy of the less powerful partners is severely limited, as noted by Stevens:

> Each partner's interest in a Big Eight firm is only a tiny fraction of a percent. What's more, they can be reprimanded, shifted from client to client, and relocated across the fifty states, often against their will. This is hardly the kind of treatment 'business owners' have to tolerate.

Id. at 32.

Large differences among partners is further reflected in their widely varying incomes. Even the "edited version," 678 F.2d at 1025, of King & Spalding's 1974 partnership agreement, supplied during discovery in the instant case, strongly suggests that not all active King & Spalding partners receive equal shares of the partnership income. See Joint Appendix (hereinafter, "Jt.App.") at 155. A decade ago,

a survey of law firms of twenty-five or more lawyers reported a large disparity in earnings among partners. Almost half the firms that responded indicated that their highest paid partners earned at least four times the income of their newest, and least well-paid, partners. Orren, A Look Inside Those Big Firms, 59 A.B.A.J. 778, 779 (1973).

A similar pattern exists in accounting firms. For example, new partners at Touche Ross earn $50,000 a year, whereas the firm's chairman earns at least $500,000 a year. Even at Price Waterhouse, which has the smallest intra-partnership earning disparities among the "Big Eight," partners' salaries range from $75,000 to $200,000. Stevens, supra p. 22, at 31.

As the above discussion demonstrates, many partnerships are large, complex, highly structured and highly stratified business organizations. Instead of looking at the realities of the many varieties of part-

nership structure and practice, especially of the large professional partnerships, the court of appeals relied on an idealized vision of "a partnership." In so doing, it erroneously constricted the reach of Title VII.

B. The Eleventh Circuit Erroneously Construed Title VII by Focusing on Formal Differences and Ignoring Functional Similarities Between Corporate and Partnership Forms of Organization in Professional Services Businesses

The inadequacy of the lower court's conception of the partnership form as limiting Title VII's coverage is further demonstrated by comparing partnerships to the analogous corporate form, the professional corporation. These two forms of business organization do not differ in any respects that are significant for purposes of Title VII analysis. However, in a professional corporation, the principals are employees of the corporation. Applying the Eleventh Circuit's "clear distinction between the

employees of a corporation and the partners of a law firm," 678 F.2d at 1028, would then yield the odd result that all employment decisions made by law firm professional corporations would be subject to scrutiny under Title VII, but some decisions by law firm partnerships would not be. The functional similarity between partnerships and professional corporations, however, shows both the shallowness of the lower court's analysis and the dangers to Title VII if this Court adopts that analysis.

The principal difference between partnerships and professional corporations has been in aspects of federal income tax treatment of the two forms. Certain disparities in the tax treatment of corporations, on the one hand, and self-employed professionals on the other, triggered the development of professional corporations side by side with partnerships. See Blum, Professional Incorporation: Social Change Created by

the Tax Laws, 14 Tax Notes 51 (Jan. 11, 1982); Wood, The Desirability of Professional Corporations after the Economic Recovery Tax Act, 60 Taxes 261 (1982). For high income taxpayers the difference in treatment of pension contributions was significant. In 1981, the maximum deductible annual contribution to her Keogh (or H.R.10) plan was the lesser of 15 per cent of her net earnings from self-employment, or $15,000. S. Rep.No. 494, 97th Cong., 2d Sess. 314 (1982). By contrast, the maximum deductible contribution for a corporate plan covering a lawyer was $45,475 for 1982. Id. at 313. In both cases, these funds, in a qualified pension trust, would earn investment income tax-free, and would be taxed to the beneficiary only when received after retirement. However, this differential has been largely eliminated by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248 ("TEFRA"). See Conference Com-

mittee Report, H.Rep.No. 760, 97th Cong., 2d Sess. 621 (1982)("The Conference agreement generally eliminates distinctions in the tax law between qualified pension, etc. plans of corporations and those of self-employed individuals....").

Aside from these tax differentials in benefits programs, there are virtually no significant substantive differences between partnerships and professional corporations. For example, a professional corporation must adhere to corporate formalities. See Rev. Rul. 70-101, 1970-1 C.B. 278-280, amplified Rev. Rul. 70-455, 1970-2 C.B. 257; Rev. Rul. 72-468, 1972-2 C.B. 647, modified Rev. Rul. 73-556, 1973-2 C.B. 424, amplified Rev. Rul. 74-439, 1974-2 C.B. 405, Rev. Rul. 82-212, 1982 U.S. Tax Week 1973. Professional corporations are also subject to payroll-based taxes, such as the federal unemployment tax, on all their professional employees, while partnerships are not so

taxed on their partners. See Tax Management Portfolio - TEFRA at A-270 and note 55 (1983).

In the two areas where one might expect the traditional distinction between corporate and partnership forms to be significant for Title VII purposes, it does not exist. Because of considerations of professional ethics and licensing, partnerships and professional corporations alike do not have the traditional corporate attributes of limitation of individual liability and ability freely to transfer shares and/or raise outside capital.

Professional corporation statutes do not generally allow a professsional to escape liability for her own torts (e.g., malpractice), nor those committed by those under her supervision. See, e.g., Ga. Code §14-7-7 (1982); N.Y. Bus. Corp. Law §1505(a)(McKinney's Supp. 1982). Indeed, in Georgia the professional corporation

form has been held not to insulate the professional employees of the corporation from liability for the torts committed by other professional employees. First Bank & Trust Co. v. Zagoria, 51 U.S.L.W. 2529 (Ga. Feb. 23, 1983).

Moreover, professional corporation statutes generally require that all stock in professional corporations be owned by persons licensed for, and actively engaged in, the practice of the relevant profession. See, e.g., Ga. Code §14-7-5(a)(1982); N.Y. Bus. Corp. Law §§1507, 1511 (McKinney Supp. 1982). In essence, such statutory requirements have eliminated the traditional corporate separation between "ownership," through ownership of stock that is freely transferable, and "employment" in the corporation. In practice, stock in professional corporations is held by professional employees of the corporation. This ownership interest, however, does not make the prin-

cipals any the less employees of the corporation.

These limitations on the traditional attributes of corporations in the professional corporation context serve to highlight the inadequacy of the lower court's view that the uniqueness of partnerships requires that they be given special exemption from Title VII.[12/] The functional simil-

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[12/] Moreover, by focusing on the partnership form as the basis for its decision, the court of appeals presented the possibility that businesses wishing to avoid Title VII liability for some employment decisions could become partnerships in order to ignore Title VII. Although there are usually strong economic disincentives involved in choosing a form of business organization for such reasons, even in part, there is currently an opportunity for professional corporations to convert to partnerships without some of the usual economic consequences. Ordinarily "disincorporation" of a successful professional corporation would be likely to precipitate a significant tax liability to the shareholder-employees, see 26 U.S.C.A. §331(a)(West Supp. 1983); 26 U.S.C.A. §1001 (West 1982). Recognizing that TEFRA's elimination of pension-related tax benefits might cause some professional corporations to liquidate, Congress enacted TEFRA §247 (not codified) as "disincorporation relief." Conference Committee

arities between the corporate and partnership forms of organization demonstrate that the Eleventh Circuit's distinction between corporations and partnerships is indeed form without substance.

[footnote con't]

Report, H.Rep.No. 760, 97th Cong. 2d Sess. 634 (1982). In 1983-1984, professional corporations will be able to liquidate without many of the negative tax consequences that usually attend such a change. Thus, there is little or no economic barrier to changing the partnership form of business organization in order to avoid Title VII. In addition, it is possible that some partnerships in non-professional fields that might have economic reasons for wanting to incorporate, would forego incorporation in order to retain their partial immunity to Title VII. The decision of the court of appeals, which permits these perverse results, would seriously undermine Title VII's goals.

III. DECISIONS ON PROMOTION TO PARTNERSHIP ARE EMPLOYMENT DECISIONS SUBJECT TO SCRUTINY UNDER TITLE VII

A. The Termination of Employment as the Result of an "Up or Out" Policy is an Employment Decision Under Title VII

As Judge Tjoflat correctly observed, Ms. Hishon was fired from King & Spalding. 678 F.2d at 1030. Although King & Spalding contended below that Ms. Hishon's losing her job was merely an effect of the decision not to offer her partnership, that distinction is both artificial and false. In the "up or out" policy adhered to by King & Spalding, 678 F.2d at 1024, failure to become a partner and failure to maintain one's employment as an associate are two sides of the same coin. "Up or out" promotion policies are almost universal among large law firms. Hoffman, supra p. 23, at 6-7; Smigel, supra p. 21, at 44, 114-16; Nelson, supra p. 24, at 122. "Permanent associates are a dying breed."

Hoffman, supra, at 144; see also Stewart, supra p. 23, at 156.[13/] Associates either become partners or must leave the law firm; in short, get promoted or get fired. See Jt. App. at 31-32 (Answer ¶9).

Discriminatory discharge is explicitly proscribed by Title VII. 42 U.S.C. §2000e-(a)(1). There is no question that, at the time of her discharge, Ms. Hishon was an employee of King & Spalding. Jt. App. at 48-49 (affidavit of James Sibley). In the analogous situation presented in Lucido v. Cravath, Swaine & Moore, 425 F.Supp. 123, 127 (S.D.N.Y. 1977), the district court held that the plaintiff had been an employee of the defendant law firm throughout the period of the alleged discrimination, including his failure to be made a partner

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13/ Interestingly, King & Spalding had one permanent associate at the time Ms. Hishon was hired. The permanent associate was also the only woman associate in the firm's 87-year history to that point. Jt. App. at 187.

and consequent discharge from the firm. The Eleventh Circuit in the instant case failed to apply the correct analysis developed by the court in Lucido, and erroneously affirmed the dismissal of Ms. Hishon's claim.

Moreover, in the specialized area of academic employment, where tenure decisions are strikingly similar to the "up or out" partnership decisions at issue in this case, courts have applied Title VII in scrutinizing decisions not to award tenure to faculty members. See Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 535 (3d Cir. 1980). Like the decision to promote an associate to partner, tenure decisions are made after periodic evaluation of the employee's suitability for tenure and they confer what is essentially a guarantee of continued employment. See Lieberman v. Gant, 630 F.2d at 64. Also, as with partnership,

a tenured employee is moved into the ranks of those people who make the important managerial decisions about the enterprise--including, significantly, decisions about who else should be awarded tenure. See NLRB v. Yeshiva University, 444 U.S. 672 (1980). Most importantly, the failure to be awarded tenure is also followed by loss of academic employment in that institution.

Tenure decisions, as well as partnership decisions, are the result of complex and varying processes. The complexity of the tenure decision-making process, however, has not led courts to hold them to be outside the scope of Title VII. Similarly, there is no reason to conclude in the instant case that because King & Spalding's process of discharging Ms. Hishon was complex and protracted, it produced something other than a discharge. Ms. Hishon's allegation that the discharge was in violation of Title VII is a claim over which the fed-

eral courts have jurisdiction, and the Eleventh Circuit erroneously dismissed it.

B. Progression from Associate to Partner is Clearly an Expectation of Employment as an Associate

Large law firms, such as King & Spalding, generally recruit law school graduates as associates, give the associates a certain number of years to prove themselves, and then either promote them to partnership or fire them. See Jt. App. at 30-32 (Answer ¶s 8-9); Hoffman, supra p. 23, 6-7; Smigel, supra p. 24, at 114-16; Nelson, supra p. 24, at 122. Thus, partnership is a critical component of an associate's career path in the firm.

Law firms recruit law school graduates for jobs as associates with clear reference to the ultimate goal of partnership. It is commonly understood by students that successful performance as an associate is rewarded with partnership. It is also understood by law firms that employment of

associates is the first step in acquiring new partners. Many law firms take the position that "they hire only people of partnership caliber." Nelson, supra p. 24 , at 126. More significant than the general statement is the fact that many firms specifically use this argument in recruiting new associates. For example, a sampling of information supplied by firms recruiting at Harvard Law School in 1982 reveals that a significant number tell students that they only hire potentially partnership-worthy people as associates.[14/] About a quarter of the firms in Atlanta, half the Houston firms, a third of the Boston firms, a third of the Chicago firms, and a fifth

14/ The sample of law firms considered here includes only those submitting an individual statement, in addition to the standardized form required by the Harvard Law School Placement Office. Thus, the percentages can not be generalized to apply to all firms in each city. Nevertheless, they are significant evidence of prevalence of the clearly marked career path from new associate to partner. (Information available in Harvard Law School Library).

of the Los Angeles firms presented themselves as hiring people they consider capable of becoming partners. The connection between associateship and partnership that is evident in the recruiting practices of large law firms contradicts King & Spalding's contention that promotion to partnership is wholly different from other employment decisions made by law firms.

Once an associate begins working in a large law firm, the work, incentives, and system of performance evaluation are geared toward partnership as the goal. The possibility of becoming a partner is "the strongest reward" in the incentive system of almost all large law firms. Smigel, supra p. 24, at 259. The years of hard work and long hours that most associates put in are part of their jobs as associates, but are also the key building blocks in advancement to partnership. Associates work hard because they know that it will help them to be-

come partners. See, e.g., Stewart, supra p. 23 , at 86.[15/]

Similarly, the evaluation of associates' work, in most large firms, stresses the associate's partnership potential. Such partnership-oriented evaluations may begin as early as two years after an associate has been hired. National Law Journal, Apr. 4, 1983 at 40, col. 1. The longer an associate has been with the firm, the more clearly connected to partnership the evaluations become. See Jt. App. at 46-47 (affidavit of James Sibley). King & Spalding, like many other large firms, has institutionalized this process, making partnership decisions a fixed number of years after an associate is hired. 678 F.2d at 1024. The partnership decision itself is merely the most definitive in the series of evaluations

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15/ A similar incentive pattern is found in large accounting firms. See Stevens, supra p. 22 , at 28-29.

of associates, each focused on the associate as potential partner.

It is, therefore, clear that the opportunity to progress from associate to partner is a "term, condition, or privilege," 42 U.S.C. §2000e-2(a), of employment as an associate. Title VII's broad mandate to eliminate employment discrimination clearly extends to promotional opportunities, at both lower-level and executive and managerial levels. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).[16/] In the instant case, promotion to the ranks of the firm's

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16/ See, e.g., Payne v. Travenol Labs, 673 F.2d 798 (5th Cir. 1982), cert. denied, 74 L.Ed.2d 605 (1983)(promotions to technical, managerial and executive level jobs); U.S. Postal Service Bd. of Governors v. Aikens, 51 U.S.L.W. 4354 (U.S. Apr. 4, 1983)(managerial positions); Sweeney v. Bd. of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated and remanded on other grounds, 439 U.S. 24 (1978), 604 F.2d 106 (1st Cir. 1979)(academic promotions); Gilmore v. Kansas City Terminal Railway Co., 509 F.2d 48, 51 (8th Cir. 1975)(managerial and supervisory positions); Pinckney v. County of Northampton, 512 F. Supp. 989 (E.D.Pa. 1981), aff'd, 681 F.2d 808 (3rd Cir. 1982)(administrative positions).

management carries with it other changes in the associate's position, such as security of tenure. These additional factors, however, which are present in many other managerial or executive-type promotions, do not alter the nature of the claim of employment discrimination. The associate has, under any circumstances, been part of an employment system that leads either to partnership or to unemployment, and is therefore entitled to the protection of Title VII. See Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 128.

C. Partnership Decisions are not Protected by the Freedom of Association

The Eleventh Circuit's conclusion that the anti-discrimination policies of Title VII are outweighed by the King & Spalding's partners' freedom of association misperceives the nature of that freedom and results in a perversion of clear Congression-

al intent to outlaw discrimination.

This Court has never recognized a right of association independent of other constitutional guarantees. One commentator described freedom of association as "little more than a shorthand phrase used by the Court to protect traditional first amendment rights of speech and petition as exercised by individuals in groups." Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. L. Rev. 1 (1977). See also, Tribe, American Constitutional Law, 701-703 (1978); Young & Herbert, Political Association under the Burger Court: Fading Protection, 15 U. Cal. Davis L. Rev. 53, 54 n. 4 (1981). Although individual justices have tried to articulate a general notion of freedom of association independently deserving constitutional protection, see, e.g., Justice Marshall's dissent in Village of Belle Terre v. Boraas, 416 U.S. 1, 15-18 (1974) and Justice Douglas' con-

currence in United States Department of Agriculture v. Moreno, 413 U.S. 528, 540-45 (1973), this Court as a whole has tended to recognize freedom of association as being tied to some underlying First Amendment right. See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981)(city ordinance placing limits on expenditures and contributions in campaigns on ballot measures violated citizens' groups' rights of political speech and association); Widmar v. Vincent, 454 U.S. 263 (1981)(if university makes facilities generally available to registered student groups, it may not discriminate on basis of content of speech against groups wishing to use facilities for religious worship and discussion).

Further, this Court has expressly and consistently held that discriminatory acts are not justifiable in the name of free association. As this Court held in Norwood

v. Harrison, 413 U.S. 455, 470 (1973):

> Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

And, even when recognizing a freedom of association for the purpose of expressing or advocating beliefs, this Court clearly has denied any unrestricted right to act on those beliefs. This principle, recognized as early as NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958), was recently reaffirmed in Runyon v. McCrary, 427 U.S. 160, 176 (1976). In Runyon, this Court held that requiring a private school, committed to the promotion of racial segregation, to admit black children did not infringe any freedom of association enjoyed by the school, the parents, or the children. As Justice Stewart wrote, the school's discriminatory practice could not be rationalized as a form of freedom of

association because a legally mandated open admissions policy would not affect the content of what was taught:

> [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in Norwood v. Harrison, 413 U.S. 455, 'the Constitution ... places no value on discrimination,' id., at 469, and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment ... it has never been accorded affirmative constitutional protections ...'

427 U.S. at 176.[17/]

Runyon involved the same issue of law presented in the instant case--whether

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17/ Cf. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-59 (1964) (upholding constitutionality of the public accommodations provisions of Title II of the Civil Rights Act of 1964):

[footnote con't on following page]

it is a violation of the First Amendment freedom of association to apply an anti-discrimination statute to a commercial organization. This Court rejected the associational claim in Runyon for precisely the reason that it should be rejected here: no right or ability to advocate any point of view is infringed when a discriminatory promotional policy is invalidated. 427 U.S. at 176-77.

This Court has held that governmental policies intended to further a compelling

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[footnote con't from preceding page]

> The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation.

See also Railway Mail Ass'n v. Corsi, 326 U.S. 88, 93-94 (1945)(due process does not prohibit state from banning racial discrimination in union membership).

state interest, like the anti-discrimination principles embodied in Title VII, may justify restrictions on associational interests. CSC v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548 (1973)(restrictions on the associational rights of federal employees justified by interest in effective government); Buckley v. Valeo, 424 U.S. 1, 24-28 (1976)(limitations on the associational rights of campaign contributors justified by interest in avoiding actuality and appearance of political corruption). Acting in disregard of these principles, the Eleventh Circuit resolved the conflict between Title VII and rights of association by simply eliminating Title VII from its analysis.

Favoring the associational interst of King & Spalding over Congressional intent to bar discrimination in employment contorts the nature of the associational right and makes a mockery of Title VII. Without

question King & Spalding, in considering whether to make Elizabeth Hishon a partner, was making a business decision. See Jt. App. at 45-48 (affidavit of James Sibley). Assertions of constitutionally guaranteed associational rights of the law firm neither obfuscate the nature of the partnership decision nor transform it into a decision warranting constitutional protection. This Court's opinions suggest that the constitutional protection accorded political speech and association is not as great when applied to ordinary business activities. Compare In re Primus, 436 U.S. 412 (1978) (reversing a reprimand of an attorney who, on behalf of the American Civil Liberties Union, had solicited a client; distinguishing "traditional fee paying arrangements," and noting representation involved could not be viewed as "motivated by considerations of pecuniary gain rather than ... [the] goal of vindicating civil liberties,"

436 U.S. at 429-30); with Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)(affirming disciplinary actions against an attorney who improperly solicited clients, noting that a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns."436 U.S. at 459).

Title VII prohibits sex discrimination in employment--it does not interfere with the exercise of discretion in the non-discriminatory selection of new partners. To hold otherwise is to adopt a view of the right of association which transcends all other considerations of law and the Constitution and which is wholly unsupported by this Court's previous rulings on the parameters of associational rights.

IV. TITLE VII'S APPLICATION TO PARTNERSHIPS AFFECTS MANY IMPORTANT SECTORS OF THE ECONOMY, NOT SIMPLY LAW FIRMS

An exception to Title VII for promotions in a partnership like King & Spalding would have an impact on industries and professions beyond law firms. In large part because of its malleability, partnership is a common form of business organization in this country. As this Court has noted, "some of the most powerful private institutions in the nation are conducted in the partnership form." Bellis v. United States, 417 U.S. 85, 93 (1970). In 1980, 1,379,654 businesses including roughly 8.4 million partners filed partnership tax returns with the Internal Revenue Service. Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1980 Partnership Returns Table 1, p. 10 (1982) (hereinafter cited as Statistics of Income-1980). Use of the partnership configuration for a

business is growing. In 1979, 1,299,593 businesses filed partnership returns, Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1979 Partnership Returns Table 1, p. 10 (1982) and in 1978, 1,234,157 did so. Internal Revenue Service, Dept. of the Treasury, Statistics of Income-1978 Partnership Returns Table 1, p. 8 (1982). These partnerships account for a significant amount of business. In 1980, for example, partnerships had total receipts of almost $300 billion, Statistics of Income-1980 Table 1, p. 10.

Partnerships can be found throughout all segments of the nation's economy. For example, in 1980, there were 8,228 partnerships of certified public accountants consisting of 53,274 partners, which earned $6.65 billion in receipts. Statistics of

Income-1980 Table 1, p. 18.[18] In addition, partnerships are widely used in the engineering and architectural fields (6,675 partnerships) id.; farming (108,094 partnerships), id. at 10; construction (66,590 partnerships), id. at 11; wholesale and retail trades (200,273 partnerships), id. at 13; insurance (7,127 partnerships), id. at 15; personal services, including laundries, beauty and barber shops (25,607 partnerships), id. at 17.

Because use of the partnership form of business organization permeates this nation's many professions and industries, a holding by this Court excluding partnerships from scrutiny under Title VII will

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[18] See supra Section II for discussion of the importance of the "Big Eight" certified public accounting firms. In addition, there were 4,783 partnerships of other accounting, bookkeeping and auditing services which included 12,564 partners and $505,000,000 total receipts. Statistics of Income-1980 Table 1, p. 18.

effectively exempt a large number of business organizations from the proscriptions of that Act. This is particularly disturbing at a time when the number of women partners in many of the above-mentioned fields continues to lag so significantly behind the increasing numbers of women entering these fields.[19/]

Public accounting firms, for example, are large employers of female certified public accountants. According to a recent

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[19/] Between 1980 and 1981, the number of women accountants doubled, resulting in an increase in the number of women accountants from 25.2% to 38.5% of the field. Bureau of Labor Statistics, U.S. Dept. of Labor, The Female-Male Earning Gap: A Review of Employment and Earnings Issues Table 5, p. 8 (Sept. 1982). Over the same period, the number of women engineers nearly tripled, resulting in a jump from 1.6% of all engineers being women to 4.3%. Id. In the five years from 1975 to 1980, the number of female architects doubled, so that women now comprise 6.7% of the field as compared with 4.3% in 1975. Greer, Women in Architecture: A Progress (?) Report and a Statistical Profile, AIA Journal, Jan. 1982, at 40 (hereinafter cited as Women in Architecture).

survey conducted by the American Woman's Society of Certified Public Accountants, 58% of its membership and that of the American Society of Women Accountants were employed in public accounting firms in 1981, almost 30% of which were national firms. American Woman's Society of Certified Public Accountants, A 1981 Statistical Profile of the Woman Certified Public Accountant (1981). Of these women, only 17.9% were partners in their firms, while 34.5% were considered non-supervisory. Id. The number of women partners in the "Big Eight" firms is even more dismal. As the New York Times reported in 1977, the "Big Eight" firms averaged fewer than three female partners each. More Women Moving into Public Accounting, But Few to the Top, N.Y. Times, Dec. 17, 1977, at 18. According to Forbes, in 1981 only one of the 125 new partners at Peat, Marwick, Mitchell was a woman, a pattern replicated throughout the "Big Eight."

Women accounted for three of Arthur Andersen's 168 new partners; three of Arthur Young's 57 new partners; none of Price-Waterhouse's 36 new partners; three of Deloitte Haskins and Sells' 64 new partners; one of Coopers & Lybrand's 70 new partners, two of Touche Ross' 58 new partners, and one of Ernst & Whinney's 75 new partners. Ms. CPA, Forbes, Aug. 17, 1981, at 8.[20/]

[20/] The attitudes that women in the "Big Eight" must fight against can be both vicious and entrenched, as illustrated by Stevens, supra p. 22 , at 22.

> 'They really were the good old days back when I was an active partner,' says a retired Big Eight auditor.... 'It was a gentleman's business, that's what I liked about it. Now, it's like the UN there.... You don't have anything in common with your partners... I just can't get used to it. I mean, in my day lunchtime was a relaxed affair. A good meal and good conversation with men of your own ilk. Now if you want to tell a joke, you have to look around the table first. One of your partners may be Negro, Spanish, a Jew, or a woman. You know how sensitive they are.'

In view of these facts, it is not surprising that the limited chance for promotions was one of the most frequent reasons given by the women accountants in the surveys described above for leaving their previous position. American Woman's Society of Certified Public Accountants, supra p. 58.

Similar patterns exist for women engineers and architects. For example, according to a 1982 survey of its membership conducted by the Society of Women Engineers, 62.4% of its members were employed in private industry, but roughly half had no regular supervisory responsibility. Only 8% served as managers or general managers. Society of Women Engineers, A Profile of the Woman Engineer 3, Table 2 p. 4, Table 7 p. 6 (1982). A survey conducted in 1981 by the American Institute of Architects Journal found that the majority of women archi-

tects were employed in architectural firms. Women in Architecture at 40. The survey results strikingly indicate a significant rise in the number of women who report being subject to discrimination in their work experience -- 56% in 1981 as compared with 40% in a similar survey conducted in 1974. Id. Of these victims of discrimination, 57% indicated they had suffered discrimination in advancement, 54% in work assignments and 51% in hiring. Many of the survey participants responded that it was difficult, if not impossible to move to managerial positions in some architectural firms.[21/] In the words of one woman, "It is extremely difficult to continue to grow

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21/ Many also commented that discrimination has detrimentally affected their sense of self esteem and self confidence, as one respondent said, "by having to re-prove myself in each new situation, rather than being accepted without questions as a competent professional. Women in Architecture, at 40.

within a firm in terms of management, scope of responsibility and salary. Most men become threatened when a woman gains competence in their areas." Id.[22/]

An exception to Title VII for promotions to partnership thus promises to shield more than just law firms from prohibitions against discrimination and reach

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[22/] Clearly, the sluggishness with which these fields have responded to the increased numbers of women has an impact beyond those women currently eligible to be considered as partners. Women at all levels feel the adverse effects of discrimination which continues at the top of their fields. Their opportunities to advance are hindered and the quality of their job experience may suffer as a consequence. See Jt. App. at 12-13 (Complaint ¶ 17); cf. Lucido v. Cravath, Swaine & Moore, 425 F. Supp. at 127 (alleged discrimination in work assignments based on religion and/or national origin). This leaves members of Title VII's protected groups unable to know whether they will be judged on their merit, after years of extended and expensive training and further years of long and hard work. It will tend to inhibit them from entering all professions, not simply law, in which partnerships are an important form of organization.

more than just those women currently eligible for consideration as partners. The lower court's decision clears the path for gross circumvention of the anti-discrimination proscriptions of Title VII by partnerships and should not be sanctioned by this Court.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Association of University Women ("AAUW") is a national organization of 190,000 college-educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW affirms its commitment to equal employment opportunity for women and men.

The American Society of Professional and Executive Women supports equal opportunity in all career paths. It deplores the continuity of exclusionary practices that curtail the achievements and contributions of women. The organization is committed to fostering positive career goals and attitudes, and recognizes the importance of this case in the application of Title VII to partnerships to affect many facets of American enterprise.

Connecticut Women's Educational and Legal Fund, Inc. ("CWEALF") is a non-profit public interest law firm specializing in cases of sex discrimination. Since its inception in 1974, CWEALF has represented plaintiffs in numerous employment discrimination cases and has also been active in educating women about their legal rights in the workplace. CWEALF is strongly interested in maintaining Title VII as a broad remedial statute against employment discrimination.

Equal Rights Advocates, Inc., is a San Francisco based, public interest legal and education corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. Equal Rights Advocates, Inc. has been particu-

larly concerned with gender equality in the work force because economic equality is fundamental to women's ability to achieve equality in other aspects of society.

The National Bar Association, Women Lawyers' Division, founded in 1925, is a professional membership organization which represents more than 10,000 Black attorneys, judges, and law students. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. To effectuate its goal of racial and sexual equality, the National Bar Association, through its Women Lawyers' Division, has been actively involved in issues concerning equal employment opportunities.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose to protect and advance women's rights. The Center repre-

sents women's concerns before federal administrative agencies and courts. The Center has been involved in a wide range of issues affecting the employment rights of women.

The Northwest Women's Law Center is a local non-profit organization that seeks to promote the rights of women through the law. The Center is concerned with the issue of sex discrimination and its total elimination from the work environment. The Center actively works to educate both women and employers throughout the Pacific Northwest about the effects of sex discrimination, the rights of women who are discriminated against, and what employers can do to eliminate discrimination from the workplace.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts

to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 190,000 men and women in more than 700 chapters throughout the United States. A major goal of the NOW LDEF is eliminating barriers that deny women economic opportunities.

Women's Equity Action League ("WEAL") is a national membership organization dedicated to securing legal and economic rights for women. WEAL's membership is committed to the full implementation of employment discrimination laws, and in particular the application of Title VII of the Civil Rights Act of 1964 to the full range of employment decisions affecting women.

The Women's Law Project is a non-profit feminist law firm dedicated to eliminating sex discrimination through litigation and public education. Since its founding

in 1973, the Women's Law Project has been concerned with institutional barriers to the advancement of women at all levels of employment. Because of its primary focus on achieving results beneficial to women through the legal system, the Women's Law Project has a special interest in the employment opportunities of women in the legal community, and believes that the protections of federal law are an essential component of achieving equal opportunity within the legal profession.

Women's Legal Defense Fund is a non-profit, tax exempt membership organization, founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment, through litigation of significant employment discrimination cases, operation of an employment discrimination

counselling program, public education, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of equal opportunity laws.